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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/381,385	02/01/2000	PHILIP C. ASHMAN	BWT1USA	3888

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EXAMINER

PATTERSON, MARC A

ART UNIT PAPER NUMBER

1772

DATE MAILED: 11/21/2001

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/381,385

Applicant(s)

ASHMAN ET AL.

Examiner

Marc A Patterson

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 31 August 2001.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,2,5-7,12 and 15-35 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,2,5-7,12 and 15-35 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

DETAILED ACTION

WITHDRAWN REJECTIONS

1. The 35 U.S.C. 112 second paragraph rejections of Claims 2, 12, 16 – 18, 20, 23, 24 and 26, of record on page 2 of the previous Action, are withdrawn.

REPEATED REJECTIONS

2. The 35 U.S.C. 112 second paragraph rejections of Claims 1, 6 and 15, of record on page 2 of the previous Action, are repeated.
3. The 35 U.S.C. 103(a) rejection of Claim 15 as being unpatentable over Sacks et al. (U.S. Patent No. 4,528,235) in view of Newman et al. (European Patent No. 0275102), of record on page 2 of the previous Action, is repeated.

NEW REJECTIONS

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. Claims 1, 5 – 7, 12, 16 – 17, 20 – 26, 29 and 34 are rejected under 35 U.S.C. 102(b) as being anticipated by Sacks et al. (U.S. Patent No. 4,528,235). Sacks et al. disclose a multilayer sheet suitable for packaging oxygen – sensitive materials (column 2, lines 17 – 33; column 3, lines 13 – 15). The sheet comprises three layers of high density polyethylene comprising 10 – 50% of a talc filler having a platelet shape (column 3, lines 27 – 48; column 5, lines 15 – 25; column 6, lines 55 – 63). Each layer constitutes a *barrier layer* which is *non – polar* (column 6, lines 4 – 27). The intermediate layer constitutes a *tie layer* between the other two layers. The

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intended use of the claimed invention, as a barrier layer which is added to the interior of an already – existing container, has been given little patentable weight.

As to newly submitted Claims 29 and 34, Sacks et al. teach that high density polyethylene is equivalent to polycaprolactam (which is an amorphous polyamide material; column 2, lines 18 – 33) as a layer of the structure; the claimed aspect of the barrier layer consisting of an amorphous polyethylene therefore reads on Sacks et al.

8. Claims 15, 18 – 19, 27 – 28, 30 – 33 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sacks et al. The invention of Sacks et al. is discussed above. Sacks et al. fail to disclose a thickness for the high density polyethylene layers of about 50 microns, an aspect ratio for the talc filler of from 16 to 30 and a CIE whiteness of at least 40. The thickness of the individual layers and the aspect ratio and purity of the filler (which determines its CIE whiteness) would be readily determined through routine experimentation by one having ordinary skill in the art, depending on the desired end result. *In re Rose*, 105 USPQ 237 CCPA 1955.

Normally, it is to be expected that a change in size, amount or thickness would be an unpatentable modification. Under some circumstances, however, changes such as these may impart patentability to an apparatus if the particular size claimed produces a new and unexpected result which is different in kind and not merely in degree from the results of the prior art. *In re Boesch and Slaney*, 205 USPQ 215 (CCPA 1980).

As to newly submitted Claims 27 – 28, 30 – 33 and 35, Sacks et al fail to disclose a thickness for the high density polyethylene layers of 5 to 25 microns, and a thickness of 5 to 15 microns, and a thickness of 5 to 150 microns, and a thickness of 10 to 70 microns, and an aspect ratio of at least 5 for the talc platelets and an average aspect ratio for the talc filler of from 16 to

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30 and a CIE whiteness for the talc filler of at least 45. However, as stated previously, the thickness of the individual layers and the aspect ratio and purity of the filler (which determines its CIE whiteness) would be readily determined through routine experimentation by one having ordinary skill in the art, depending on the desired end result. *In re Rose*, 105 USPQ 237 CCPA 1955.

Normally, it is to be expected that a change in size, amount or thickness would be an unpatenable modification. Under some circumstances, however, changes such as these may impart patentability to an apparatus if the particular size claimed produces a new and unexpected result which is different in kind and not merely in degree from the results of the prior art. *In re Boesch and Slaney*, 205 USPQ 215 (CCPA 1980).

ANSWERS TO APPLICANT'S ARGUMENTS

9. Applicant's arguments regarding the 35 U.S.C. 112 second paragraph rejection of Claims 2, 12, 16 – 18, 20, 23, 24 and 26, of record on page 2 of the previous Action, have been considered and have been found to be persuasive. The rejections are therefore withdrawn.

Applicant's arguments regarding the 35 U.S.C. 112 second paragraph rejection of Claims 1, 6 and 15, the 35 U.S.C 102(b) rejection of Claims 1, 5 – 7, 12, 16 – 17 and 20 – 26 as being anticipated by Sacks et al. (U.S. Patent No. 4,528,235), the 35 U.S.C 103(a) rejection of Claims 15, 18 and 19 as being unpatentable over Sacks et al. and the 35 U.S.C 103(a) rejection of Claim 15 as being unpatentable over Sacks et al. in view of Newman et al. (European Patent No. 0275102) have been considered but have been found to be unpersuasive for the reasons set forth below.

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Applicant argues, on page 7 of Paper No. 7, that amended Claims 1, 6 and 15 overcome the 35 U.S.C. 112 second paragraph rejection. However, the term 'flexible' is clearly a relative term, which is not defined in the specification or claims; it therefore renders the claim indefinite.

Applicant also argues, on page 9, that amended Claims 1, 5 – 7, 12, 16 – 17 and 20 – 26 overcome the 35 U.S.C. 102(b) rejection as being anticipated by Sacks et al., because Sacks et al. do not disclose a non – polyolefin barrier layer, and furthermore do not disclose a polyamide barrier layer. However, Sacks et al. teach that polyamide is equivalent to high density polyethylene as a layer of the structure (column 2, lines 18 – 33); the claimed aspect of the barrier layer being non – polyolefin and the layer inward of the barrier layer being a polyolefin resin having a platelet talc filler therefore reads on Sacks et al.

Applicant also argues, on page 12, that the combination of Sacks et al with Newman et al is improper because Sacks et al are concerned with films having increased resistance to vapor permeability, whereas Newman et al are concerned with providing a thermally stable container which are withstand heat generated inside a microwave oven. However, as stated on page 2 of the previous Action, both Sacks et al. and Newman et al. are directed to the use of films comprising polyolefinic layers and non – polyolefinic barrier layers; it would therefore have been obvious to one of ordinary skill in the art at the time Applicant's invention was made to fabricate a container from the multilayer polyolefinic sheet disclosed by Sacks et al. for the purpose of preparing foods for heating in microwave ovens as taught by Newman et al.

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10. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Conclusion

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Marc Patterson, whose telephone number is (703) 305-3537. The examiner can normally be reached on Monday through Friday from 8:30 AM to 5:00 PM. If attempts to reach the examiner by phone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached at (703) 308-2364. FAX communications should be sent to (703) 305-3599. FAXs received after 4 P.M. will not be processed until the following business day.

M.A.P.


HAROLD PYON
SUPERVISORY PATENT EXAMINER
1772

11/19/01